

ENHANCING SECURITY- PROJECTING CIVIL AUTHORITY INTO AMERICA'S  
UNCONTROLLED SPACES

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by

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The opinions and conclusions expressed herein are those of the student author and do not necessarily represent the views of the U.S. Army Command and General Staff College or any other governmental agency. (References to this study should include the foregoing statement.)

## ABSTRACT

ENHANCING SECURITY- PROJECTING CIVIL AUTHORITY INTO AMERICA'S UNCONTROLLED SPACES, by William Presson, 74 pages.

Actions taken or not taken by law enforcement agencies, in ungoverned spaces reduce US ability to forestall hostile actions on US soil. The current organization of the United States civil authorities and their limitations to impact "Ungoverned Spaces" within the United States poses problems to accomplish the goals of our National Security Strategy to "Prevent attacks on the Homeland" and "Enhancing security at Home." To that end, this thesis examines areas of the United States that function as "Ungoverned Spaces" and possible strategies to maximize Interagency and interoperable government control through joint operations between civil authorities and Department of Defense forces. Finally, the author analyzed the gaps in the ability of law enforcement to project civil authority into ungoverned spaces and the historical short falls of civil law enforcement in past events. The recommendations suggest; the creation of a full time paramilitary police force trained, and maintained in sufficient size and strength to police our nations ungoverned spaces, established as a full time National Guard unit. Satisfying the author's recommendations on the use of the National Guard as a paramilitary police force, he examined the historical and a current legal precedent the author believes allows it is legal to deploy National Guard troops under Title 32 as law enforcement entities.

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## ACRONYMS

CBP	Customs Border Protection
CFR	Code of Federal Regulations
CSIS	Center for Strategic and International Studies
DHS	Department of Homeland Security
DoD	Department of Defense
DTOs	Drug Trafficking Organizations
EMAC	Emergency Management Assistance Compacts
FBI	Federal Bureau of Investigation
FEMA	Emergency Management Agency
FLETC	Federal Law Enforcement Training Center
GAO	Government Accounting Office
HRT	Hostage Rescue Team
JIACG	Joint Interagency Coordinating Group
JTF-N	Joint Task Force North
LEOs	Law Enforcement Officers
NFS	National Forest Service
NORAD	North American Aerospace Defense Command
NSS	National Security Strategy
SWAT	Special Weapons and Tactic
TCO	Transnational Criminal Organizations
U.S.	United States
USDA	United States Department of Agriculture
USG	United States Government

USMS

U.S. Marshals Service

USNORTHCOM

U.S. Northern Command



## CHAPTER 1

### INTRODUCTION

What are ungoverned spaces? In order to understand this concept, first one must understand how jurisdictional authority for law enforcement at the federal, state and local levels functions. The United States is policed by approximately 18,760 separate law enforcement agencies comprised of approximately 940,275 employees. The combined annual budget for all of these agencies is about \$51 billion dollars annually, of which 15 percent comprises Federal funding.<sup>1</sup> Two of three small towns do not have a police department because they cannot afford to pay for one. There are approximately 60 Federal Law Enforcement agencies of which most reside in the Department of Justice, Treasury, and Homeland Security. These federal agencies execute their missions under federal statutory authority.

“The 10th Amendment to the Constitution reserves police powers to the states, and both the separation of powers and tradition has resulted in a fragmentation of police structures at lower levels of government.”<sup>2</sup> The fragmentation of police structures at the state level gives separate, but overlapping jurisdiction to State and county agencies in local government levels for enforcing laws within those jurisdictions.<sup>3</sup> The state and county law enforcement agencies by law will have a wider or greater jurisdiction than the local cities or townships except as codified in state law.

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<sup>1</sup>T. O'Connor, “Police Structure of the United States,” *Mega links in Criminal Justice*, <http://www.drTomocnnor.com/megapolice.htm> (accessed May 12, 2012).

<sup>2</sup>Ibid.

<sup>3</sup>Ibid.

For instance, take any town in America. Town A has roads that connect to town B. These roads are designated as either state highways or county roads. Both the county and the state have joint responsibility to maintain the roads. Each governing body also has the jurisdiction to enforce the respectable level of law on these roads, even though they may be inside a separate township. The local jurisdiction may have the authority to enforce county, state or federal laws on that roadway because it also resides within their township. The resulting impact is a fractious police enforcement delayed by friction during emergencies or criminal activities that cross or straddle jurisdictional boundaries. When local jurisdictions cannot afford their own police departments they are dependent on the county Sheriff or Police departments for law enforcement functions. The manpower available to local towns from the Sheriff's Department dictates the level of police presence or patrol they receive. This lack of police presence or coverage can cause a gap in services. This leads to underserved areas and creates ungoverned spaces limiting the ability of government to project civil authority in those areas.

The example given above also serves to exemplify gaps in law enforcement services in areas such as National Forests, Indian Reservations, National Parks and our national borders create "Ungoverned Spaces" that overlap Federal, State, Local and Tribal responsibilities where it is difficult to project civil authority, maintain security and the rule of law.<sup>4</sup> National Forests, Indian Lands, National Parks, and our national borders are the primary responsibility of the Federal government to police. The state, county, and local law enforcement officials these federal properties overlap may or may not have

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<sup>4</sup>Angel Rabasa, *Ungoverned Territories*, Testimony presented before the House Oversight and Government Reform Committee, Subcommittee on National Security and Foreign Affairs on February 14, 2008, RAND Corporation.

jurisdiction or even access to the area to conduct law enforcement operations, or the ability to project civil authority.

The boundary overlay of multiple jurisdictions creates an issue of who has primacy to enforce civil authority there. The Jefferson National Expansion Memorial, better known to many by the recognizable 630-foot tall gleaming stainless steel Gateway Arch in St. Louis, Missouri, is a national park. It is operated and patrolled by the National Park Service, a federal entity that is geographically located within the St. Louis Metropolitan police jurisdiction. The National Park Service Police has the responsibility for projecting civil authority in the 90.96 acres of National Park since the park is a federal land.<sup>5</sup>

Although much research has been conducted on the use of Department of Defense assets in a law enforcement capacity or in support to civil authorities, there is little research targeting the use of Department of Defense assets in support their national security mission within the United States to project United States Government authority into “Ungoverned Spaces.” There are numerous research articles and papers discussing U.S. government efforts to control “Ungoverned Spaces” outside the continental United States the Horn of Africa, South and Central America and Afghanistan that can be applied in analyzing this issue as it relates to the need in the United States. With vast tracts of the United States southern and northern borders inadequately manned, U.S. National Parks, Forestlands and American Indian lands used as drug gang’s trafficking routes, our ability to “deny hostile actors the ability to operate within our borders” is a

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<sup>5</sup>National Park Service, “Frequently Asked Questions,” <http://www.nps.gov/faqs.htm> (accessed May 12, 2012).

national strategy goal that needs some teeth.<sup>6</sup> In order for the United States to achieve its National Security Strategy's goals to "Strengthen Security and Resilience at Home" it will need to address the "Gap" created by uncontrolled spaces.<sup>7</sup>

Indian Lands in the United States provide law enforcement authorities with their own set of unique problems. Indian Reservations are considered sovereign nations and are governed by independent Indian tribal councils and laws. The United States government exercises authority and jurisdiction over Indian Lands by treaty as a protectorate within the boundaries of the United States since 1824. The United States Department of Interior and the Bureau of Indian affairs are charged by the United States government with managing Indian affairs and legal issues with the United States government, and the states that have Indian reservations.<sup>8</sup> This responsibility is as a result of treaties signed between the United States government and some 566 federally recognized United States Indian Tribes. Any state, or county local authority must have a treaty in place to conduct business with the Indian nations and law enforcement functions on an Indian reservation.<sup>9</sup>

Federal lands such as national parks, national forests, and the United States Borders are policed by more than one federal agency. These federal lands transcend multiple state and local borders where state and local governments do not have the

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<sup>6</sup>The White House, *National Security Strategy* (Washington, DC: Government Printing Office, May 2010).

<sup>7</sup>Ibid.

<sup>8</sup>US Department of the Interior Indian Affairs, "What We Do," <http://www.bia.gov/whatwedo/index.htm> (accessed May 15, 2012).

<sup>9</sup>Ibid.

authority and often time the resources to regularly project civil authority into federally controlled areas creating undercontrolled or ungoverned spaces. For the purpose of this thesis, an ungoverned space is defined as an area where the state is absent, unable, or unwilling to perform its functions. This does not imply the complete absence of power structures but can be characterized by the lack of penetration into the general society. Ungoverned spaces can be areas of the states where they poorly control their land, maritime borders or airspace. They may be otherwise viable states where the central government's authority does not extend. They are areas where "otherwise healthy states have lost control over some of its geographic or functional space within their territories."<sup>10</sup> This problem is not unique to the rural or Federal lands, law enforcement in major metropolitan cities such as the District of Columbia, Los Angeles, Detroit and St. Louis have areas within their urban footprint that police officers do not patrol or respond to calls without first massing forces for officer safety. These areas are controlled by criminal elements whose criminal enterprises and activities disrupt the daily lives, or civil order of the area. This problem mirrors U.S. efforts in other countries such as the Horn of Africa, Tri-Border region of South America, Columbia, and Afghanistan where the central government cannot project its power on a daily basis in areas of their countries or borders to perform its functions.<sup>11</sup>

The result of the police organizational structures at all levels of government, the separation of powers distributed among state, county and local authorities can cause detrimental political and jurisdictional friction during emergencies or criminal activities

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<sup>10</sup>Rabasa.

<sup>11</sup>Ibid.

that cross or straddle jurisdictional boundaries. Jurisdictional gaps impact authority and appropriate levels of response by civil authorities. Examples of jurisdictional gaps include siege incidents such as Waco, Wounded Knee, and Ruby Ridge causing multiple gaps in the ability of law enforcement to appropriately respond, mitigate and apprehend perpetrators committing criminal acts at these sites. Events of these magnitudes are beyond the scope of normal police responses and require resources, sustainment and policing skill sets beyond the regulatory, funding, and capacity of local responding federal and state authorities. The examples discussed above all required military support in the form of National Guard or federalized military assistance to conclude the events.

The Branch Davidian Compound siege in Waco, Texas and the arrest attempt of Randy Weaver at his family compound at Ruby Ridge, Idaho were civil law enforcement arrest operations conducted by federal civil authorities. In both incidents, the civil enforcing body was overcome by events resulting in the deployment of National Guard assets to support and sustain civil law enforcement during month long operations.<sup>12</sup>

At Waco, federal agents operated National Guard armored personnel carriers provided by the Texas, and Alabama National Guard to attempt to breach and assault the Branch Davidian compound after a 51-day siege. The large perimeter of the compound, multiple heavily armed assailants inside the compound and finite number specialized FBI Tactical units stressed federal agencies ability to maintain the integrity of the incident to the breaking point. At Ruby Ridge, Idaho National Guard armored personnel carriers were utilized by Idaho's State Critical Response Team and U.S. Marshals Service

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<sup>12</sup>Philip B. Heymann, *Lessons of Waco: Proposed changes in Federal Law Enforcement* (Washington, DC: Department of Justice, 1993), 1-4.

members to rescue Supervisory Deputy U.S. Marshal Larry Cooper and recover the body of Deputy U.S. Marshal Billy Degan from Weaver's property after an exchange of gunfire left Degan dead and Cooper pinned down.

Active shooters present law enforcement with another gap in training and enforcement. One such example was the recent Mumbai terror attack. While Mumbai law enforcement responded using local methods to resolve the active shooter event, Indian Counter Terrorism forces had to be dispatched to the scene to end the siege. This application at Mumbai, in this research suggests that a similar gap exists within the U.S. The Columbine High school shooting qualifies as such an event as does perhaps the Virginia Tech tragedy. Mumbai, India and Beslan, Russia show us another gap in the ability of local law enforcement authorities to successfully engage a trained persistent and mobile terrorist force. Local law enforcement authorities in Mumbai, India were quickly overwhelmed when a mobile team of Islamic terrorists using "Active Shooter" tactics infiltrated Mumbai from the Indian Ocean using a stolen fishing boat. The ensuing confusion and lack of sufficiently armed and trained police officers resulted in 10 heavily armed terrorists holding the business district hostage until Indian military and Counter Terrorist forces could be mobilized to respond.

In 1997, two heavily armed gunmen entered the Bank of America branch of North Hollywood, California to conduct a bank robbery. Both assailants were armed with multiple fully automatic rifles, handguns and covered from neck to thigh with heavy Kevlar body armor. A Los Angeles Police patrol driving by the bank that morning observed the two heavily armed assailants entering the bank and called for assistance. When the two heavily armed assailants exited the bank dozens of Los Angeles police

officers that had responded to the call confronted them. Los Angeles Police Officers were armed only with their issued service pistols; one officer had a 12-gauge shotgun. In the initial armed confrontation, the two bank robbers exchanged gunfire with Los Angeles police officers driving them off the front of the bank from behind their squad cars with withering bursts of automatic gunfire. Outgunned and unable to effectively penetrate the bank robber's body armor with their duty weapons, officers on the scene called for the assistance of the Los Angeles Police Department Special Weapons and Tactic (SWAT) Team. It took 18 minutes for the Los Angeles Police Department SWAT team to arrive on the scene with effective firepower and mass against the two heavily armed bank robbers.<sup>13</sup>

The bank robbery had turned into an active shooter scenario and gone mobile with the bank robbers attempting to elude law enforcement officers while officers struggled to contain them in the bank parking lot. U.S. civilian law enforcement is trained to respond quickly to the scene, mass as a response team, locate and close with the shooter to neutralize or kill them.

The April 20, 1999 Columbine School massacre in Littleton, Colorado is another example of an active shooter incident. Responding Local law enforcement were not trained to set up immediate ad hoc entry teams, and as a result instead set up a traditional secure perimeter to contain the shooters. This tactic left the shooters inside the school to roam freely killing 12 of their fellow students and one teacher, before Littleton Police and Jefferson County SWAT teams massed at the school to make their response. Active

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<sup>13</sup>CNN, "Botched L.A. bank heist turns into bloody shootout," February 28, 1997, [http://articles.cnn.com/1997-02-28/us/9702\\_28\\_shootout.update\\_1\\_armored-police-chief-willie-williams-car-wreck?\\_s=PM:US](http://articles.cnn.com/1997-02-28/us/9702_28_shootout.update_1_armored-police-chief-willie-williams-car-wreck?_s=PM:US) (accessed May 15, 2012).



shooter incidents require an immediate law enforcement response and entry of the shooting scene to close with and neutralize the attacker(s). This takes an immense amount of law enforcement resources and first responders to secure and clear the scene. If there is more than one coordinated attack happening simultaneously in multiple geographic locations, it creates a gap in the ability of law enforcement to respond effectively to all incidents.

In a Mumbai type scenario, where local law enforcement authorities confronted multiple attacks dispersed over a wide area have to respond with enough combat power in multiple locations in multiple engagements might be overwhelmed quickly in the average U.S. city. When a scenario, like Mumbai, then transitions to a multi-story high rise building, with multiple highly armed and motivated terrorists, local law enforcement will be unable to mount an immediate effective response. They will have to pool other law enforcement agencies from unaffected surrounding agencies to assist them.

If multiple incidents occur in adjacent cities, the civil law enforcement authority's capabilities will also be overwhelmed. This was the case in the Beslan, Russia incident where over 31 heavily armed Chechen terrorists seized and fortified a school in the city of Beslan thwarting not only the local authorities and counter terrorist units' efforts to rescue the 1,100 hostages inside, but also the Russian Special Forces units. The resulting carnage of over 334 dead men, women, and children changed the way U.S. law enforcement looked at these types of incidents.<sup>14</sup>

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<sup>14</sup>Radio Free Europe/Radio Liberty, "Beslan Rescue Lacked Direction, Says Ex-FSB Head," <http://www.rferl.org/articleprintinterview/1063904.html> (accessed May 12, 2012).

U.S. civil law enforcement does not have a counter terrorism unit of sufficient strength that could be mobilized for such incidents across the U.S. major cities like Los Angeles, New York, Houston, and Dallas maintain large standing professional tactical units. The average U.S. city across the U.S. does not have the capacity or resources to do so, however. They rely on multiple smaller local or regional teams from across the geographic area that do not always work or train together enough. This is a gap, a flaw in the ability of U.S. law enforcement to respond to a major terrorist event.

The thesis topic is “Enhancing Security- Projecting civil authority into America’s uncontrolled spaces” This topic centers on the inability of civil federal, state, local or tribal authorities to control their geographic or functional space within their territories in such areas as our national borders, federal lands and national security events. Is there a need to reshape how law enforcement responds to these events?

There are subordinate questions to this thesis. What are “Ungoverned Spaces” in the United States? How are law enforcement agencies organized to address these areas? What are the roles of the federal and tribal authorities regarding these spaces, their jurisdiction and response? What Department of Defense assets can or are being used to assist civil law enforcement? What happens when you have a Waco, or Beslan types of attacks and multiple terrorist events that occur simultaneously? Waco and Beslan types of events are significant because they involve highly persistent armed barricaded subjects who will have to be physically rooted out of an extremely hazardous and dangerous siege site by law enforcement officers. What are the abilities of the law enforcement and the Department of Defense to actively respond to multiple events?

This research is significant to the 2010 U.S. Security Strategy that seeks to create a strategy to meet a full range of threats and hazards in our communities. The U.S. National Security Strategy is the President’s strategic vision on how the U.S. government will conduct and promote national security. The U.S. Department of Homeland Security is responsible for Homeland Security and the accomplishment of the 2010 National Security Strategy (NSS).

The current organization of the United States civil authorities and their limitations to impact “Ungoverned Spaces” within the United States pose problems to accomplishing the goals of our National Security Strategy to “Prevent attacks on the Homeland” and “Enhancing security at Home.”<sup>15</sup> Being unable to police or project civil authority into “Ungoverned Spaces” would deny the United States the ability to prevent and deter attacks by identifying and interdicting threats, and denying hostile actors the ability to operate within our borders, and protecting the nations critical infrastructure.<sup>16</sup> These hazards include terrorism, natural disasters, large scale cyber attacks, and pandemics.<sup>17</sup>

The United States needs to control access to its borders, Indian Lands, and National forests to deny access to hostile actors who would threaten U.S. citizens and critical infrastructure. Actions taken or not taken in ungoverned spaces reduce U.S. ability to forestall hostile actions on U.S. soil. This thesis will examine areas of the United States that function as “Ungoverned Spaces” and possible strategies to maximize

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<sup>15</sup>The White House, *National Security Strategy* (Washington, DC: Government Printing Office, May 2010).

<sup>16</sup>Ibid.

<sup>17</sup>Ibid.

Interagency and interoperable government control through joint operations between civil authorities and Department of Defense forces.

## CHAPTER 2

### LITERATURE REVIEW

This chapter is an overview of the literature used to produce this thesis based on its ability to help answer the question of how to meet the goals set forth in the *2010 United States National Security Strategy* (2010 NSS) of security and resilience at home. The 2010 NSS specifically sets the goal of “preventing and deterring attacks by identifying and interdicting threats, denying hostile actors the ability to operate within our borders.”<sup>18</sup> The existence of ungoverned spaces within the United States hinders the ability of the United States Government from accomplishing that goal. The ability of the United States to project civil authority into its own ungoverned spaces is not a well-researched or written topic. There are no scholarly articles, or material that directly address ungoverned spaces within the United States, there are numerous materials that address international ungoverned spaces that can be applied in theory and principle to this thesis. There is a large volume of scholarly material, legal opinions, government publications, and legitimate media articles available to address the topic of the use of the military in a Defense Support to Civil Authorities capacity and the limits of their use under the Posse Comitatus Act. The majority of the author’s research came from these sources. The author also used previously written MMAS theses, in related subject matters that were useful, but none focused on addressing the problem of ungoverned spaces and the National Security Strategy’s Homeland Security goals within the United States.

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<sup>18</sup>The White House, *National Security Strategy*.

The United States National Security Strategy identifies the ability of the U.S. government to prevent and deter attacks and denying hostile actors' the ability to operate within our borders as a key goal to security at home. The NSS further recognizes the link between domestic and transnational security and that one of the key objectives of the 2010 National Security Strategy is to deny safe havens and strengthen At-risk States (referring to foreign countries). For the NSS to be successful, the United States law enforcement will need to project civil authority into ungoverned spaces. Restating the definition from chapter 1, Ungoverned Space is an area where the state is absent, unable, or unwilling to perform its functions. This does not imply the complete absence of power structures but can be characterized by the lack of penetration into the general society. Ungoverned spaces can be areas of the states where they poorly control their land, maritime borders, or airspace. They may be otherwise viable states where the central government's authority does not extend. They are areas where "otherwise healthy states have lost control over some of its geographic or functional space within their territories."<sup>19</sup> This is an international definition of "Ungoverned Spaces," but it applies equally to the U.S. For the purposes of this thesis, when the word "state" is used, it refers to a state government entity, or geographical location within of the United States.

During his testimony before the House Oversight and Government Reform Committee, Subcommittee on National Security and Foreign Affairs on February 14, 2008, Angel Rabasa a RAND Corporation researcher testified about his final report on

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<sup>19</sup>Rabasa.

the dangers of ungoverned spaces in nation states.<sup>20</sup> Rabasa's final report for the U.S. Air Force titled "Ungoverned Territories: Understanding and Reducing Terrorism Risks"<sup>21</sup> describes the "threats to U.S. Security that may arise from areas within states or at the boundaries between states that , for various reasons are not controlled by a central authority."<sup>22</sup> Rabasa referred to foreign nation states, an international body, not a state within the U.S. His report identifies an example of a nation state that has lost control over some of its geographic or functional space within its territories that would otherwise function reasonably well could suffer from a high level of illegal immigration across its poorly controlled borders and the presence of criminal gangs involved in that activity.

In an article published in the *Journal of Threat Convergence* Fall of 2010 Dr. James J.F. Forest wrote a similar article titled "Engaging Non-State Actors in Zones of Competing Governance." Based on his studies of uncontrolled areas of foreign countries where the central government is unable to project its power and civil control into geographic areas of the nation, Forest stated that these areas created unique areas for terrorist and criminal groups to thrive.<sup>23</sup>

The legal opinions of how and when the military can be used in a law enforcement function are long and varied, but hinge primarily on the Posse Comitatus Act. Historically the United States has a long history of using its military to patrol and

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<sup>20</sup>Angel Rabasa, et al., "Ungoverned Territories: Understanding and Reducing Terrorism Risks" (Monograph, RAND Corporation, 2007).

<sup>21</sup>Rabasa.

<sup>22</sup>Ibid.

<sup>23</sup>Dr. James J. F. Forest, "Engaging Non-State Actors in Zones of Competing Governance," *Journal of Threat Convergence* (Fall 2010).

prosecute incursions of its borders. This dates back to 1916 when Pancho Villa crossed the U.S. border in Columbus, New Mexico overrunning the small garrison there and burning the town to the ground. General Black Jack Pershing was dispatched along with the U.S. Army to pursue him and his outlaws into Mexico to apprehend him.

During World War I and World War II, U.S. Military troops were used to patrol the U.S. borders. The United States has used the military since the beginning to augment civil law enforcement. Troops were routinely called upon to bolster the combat power of local and federal posses. This led to the enactment of the *Posse Comitatus Act of 1878*, which was codified into Title 18 U.S.C. section 1385. *The Posse Comitatus Act* was intended to keep local and federal law enforcement authorities from commandeering the military garrison into a posse and pressed into service as police officers (a posse) in the post-reconstruction South after the Civil War.<sup>24</sup>

Although the Posse Comitatus Act is not an absolute prohibition, it has been the largest deterrent to the use of the United States military inside the country to conduct law enforcement operations jointly or independently with civilian law enforcement. Historically, the United States has used the United States military to suppress strikes (the railroad strike of 1877),<sup>25</sup> and rebellions (1794 Whiskey rebellion).<sup>26</sup> In the aftermath of

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<sup>24</sup>John R. Brinkerhoff, "The Posse Comitatus Act and Homeland Security," *Journal of Homeland Security* (February 2002), <http://www.homelandsecurity.org/journal/articles/brinkerhoffpossecomitatus.htm> (accessed May 12, 2012), 2-4.

<sup>25</sup>Encyclopedia of Chicago, "Railroad Strike of 1877," <http://encyclopedia.chicagohistory.org/pages/1037.html> (accessed May 12, 2012).

<sup>26</sup>Laurel Cameron, ed., "The Whiskey Rebellion 1794," *The Web chronology Project*, <http://www.thenagain.info/webchron/USA/Whiskey%20Reb.html> (accessed May 21, 2012); Department of Justice, Memorandum, *Authority for Use of Military*



the Rodney King verdict in Los Angeles in 1992, California Army National Guard, U.S. Army, and Marines were sent by order of President George H. W. Bush along with Federal riot police to quell the violence and restore order under the United States Code Title 10, Chapter 15, Section 332 known as the *Insurrection Act*. More recently on October 23, 2001, United States Attorney General Alberto R. Gonzales, then counsel to Present George W. Bush requested a ruling from the United States Justice Department on whether or not the United States military could be used inside the United States to combat terrorist activities. In a memorandum authored by John C. Yoo, Deputy Assistant United States Attorney General and Robert J. Delahunty, Special Counsel to the Department of Justice, the president had ample authority to deploy the United States military inside the United States against international or foreign terrorists.<sup>27</sup>

In 1965 in Los Angeles, California, a routine drunk driving arrest sparked the infamous Watts riots causing the response of approximately 15,000 California Army National Guard troops to help put down the riots over a four-day period. On May 4, 1970 Ohio National Guard troops operating as Title 32 status forces were dispatched by Governor James Rhodes to quell riots on some college campuses resulting in the Kent State shootings of students. Without the help of the National Guard operating under Title 32 and regular military forces operating under Title 10 status the civil authorities were in danger of being overwhelmed by the criminal elements or mobs. The use of military forces in support of civil operations such as disasters and in support of the war on drug

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*Force to Combat Terrorist Activities Within the United States* (Washington, DC: Office of Legal Counsel, 2001).

<sup>27</sup>Department of Justice.

trafficking along the U.S. Southwest border has been allowed since 1989 to supplement the capabilities of state, local, federal, and tribal authorities. *The Posse Comitatus Act* is not a constitutional constraint, it is a statutory authority enacted to limit the use of the military from conducting everyday law enforcement.

In the last 20 years, Congress and the courts through new laws and judicial opinions to provide the U.S. Government with the ability to project and restore civil authority have consistently circumvented PCA.<sup>28</sup> Ashly J. Crawford writing an article in the *G. M. Legal review* goes further in her article stating that the Posse Comitatus Act prohibits the U.S. government from utilizing its best tool, the military to respond to natural disasters like Hurricane Katrina in the Gulf States to restore order and to assist law enforcement in stopping criminal activity that is impeding relief efforts. Crawford advocates another narrow exception to PCA mirroring the Insurrection Act that allows for the military to respond to large scale disasters to enforce the law and restore order.<sup>29</sup>

In November 2002 President George W. Bush signed into law the Homeland Security Act of 2002 creating the United States Department of Homeland Security (DHS) in response to the September 11, 2001 terrorist attacks. The mission of the new Department of Homeland Security is to prevent terrorist attacks within the United States, reduce the vulnerability of the U.S. to terrorism and minimize the damage, and assist in

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<sup>28</sup>Major Craig T. Trebilcock, "The Myth of Posse Comitatus," *Homeland Security Journal*, 2000, <http://www.homelandsecurity.org/journal/articles/trebilcock.htm> (accessed October 1, 2011).

<sup>29</sup>Ashley J. Crawford, "A Call to Arms: Civil Disorder following Hurricane Katrina Warrants Attack on Posse Comitatus Act," *George Mason Law Review* 14, no. 3 (2007): 829-857.

the recovery from terrorist attacks that do occur within the U.S.<sup>30</sup> The DHS was created to give one national organization the primary responsibility to protect the American homeland. DHS has four divisions that are responsible for border and transportation security, emergency preparedness and response, chemical, biological and nuclear countermeasures as well as information analysis and infrastructure protection.<sup>31</sup> To accomplish these tasks Congress authorized the movement of the Border Patrol, Immigration and Naturalization Service from the Department of Justice, and the Coast Guard from the Department of Transportation. Congress further authorized the movement of the U.S. Customs Service and the U.S. Secret Service from the Department of Treasury and the Federal Air Marshal Service from the Federal Aviation Administration into DHS. The addition of the Federal Emergency Management Agency (FEMA) and the Federal Law Enforcement Training Center (FLETC) would complete the new cabinet level department.<sup>32</sup>

This thesis will provide an alternative to the exceptions to Posse Comitatus Act by creating a military entity that could operate as a National Guard in a full time capacity, funded by Homeland Security funding through the states to maintain their Title 32 status under U.S. Northern Command (USNORTHCOM). The gap in the National Security Strategy to “prevent and deter attacks by interdicting threats, denying hostile actors the ability to operate within our borders and protect the nation’s critical infrastructure” lies in

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<sup>30</sup>Department of Homeland Security, Website, <http://www.dhs.gov/index.shtm> (accessed May 15, 2012).

<sup>31</sup>Ibid.

<sup>32</sup>Ibid

the ability of law enforcement to project civil authority into ungoverned areas in the United States.<sup>33</sup> Without the assistance of the U.S. military, closing this gap will be impossible.

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<sup>33</sup>The White House, *National Security Strategy*.

## CHAPTER 3

### RESEARCH METHODOLOGY

The primary research topic in this thesis is “Enhancing Security- Projecting Civil authority into America’s uncontrolled spaces.”

The research methodology used in this thesis reviews documents from a wide variety of government reports, academic works, media accounts, and historical documents to conduct an analysis of this material for trends and gaps that will lead to a conclusion. This includes a historical review of past research and legal case reviews on the use of the U.S. Military to assist and work with civil authorities. Some information on the use of the military in ungoverned spaces within the United States is not as prevalent, but other research that has been done on ungoverned spaces in other countries by U.S. forces can be used for the analysis.

A stated purpose of this thesis is to examine the problem of projecting civil authority into areas that law enforcement either has little or no representation in because of resources, manpower, or geographic restrictions. The author’s intent is to keep the examination of this topic at the federal level of law enforcement; any lower level examination is beyond the scope of this thesis. The intended audience for this thesis includes military and civilian law enforcement agencies responsible for maintaining United States domestic security.

The information in this thesis will be presented through three secondary research questions. Each secondary research question will contain three to four sub- topics, the analysis of which will provide an over all answer to the secondary research question.

The first secondary research question in this methodology is to define what an ungoverned space is? Answering this question- coming up with a definition will help identify areas within the United States within the scope of this thesis that can be analyzed in this study. Mr. Angel Rabasa's report for the RAND Corporation and ensuing testimony before Congress outlines the dangers of ungoverned spaces, or territories as they relate to foreign countries.<sup>34</sup> These same characteristics for ungoverned spaces can be applied to areas within the United States that can provide a sanctuary to criminals and terrorists. This author will apply Rabasa's characteristics to the United States Southwest border, Indian lands, national parks and forests where there are ungoverned spaces in areas of U.S. states and where jurisdictional authorities have little control over their land and maritime borders or airspace. This does not imply the complete absence of civil authority but can be characterized by the lack of penetration into the geographic area. They are otherwise viable states where the central government's authority does not or cannot extend.<sup>35</sup>

Another secondary research question in this methodology is to look at the organizational layout of law enforcement agencies and jurisdictional restrictions. The number of separate law enforcement jurisdictions, staffing levels and ability to project civil authority in to their areas of responsibility will be examined. The effects of geography, logistics and intelligence gaps have on the ability of law enforcement operations to project civil authority into ungoverned spaces. Although state and local

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<sup>34</sup>Rabasa et al., "Ungoverned Territories."

<sup>35</sup>Rabasa.

jurisdictions are drawn and defined by state boundaries as defined by state laws, Indian lands, national forests and parks are not.<sup>36</sup>

The sub topic to the second question in this methodology is to examine what are the roles of federal authorities in projecting civil authority into such ungoverned spaces as National Forests, the national borders and Indian lands? State and local authorities have no legal jurisdiction to enforce local laws or ordinances within federal or Indian lands. Crimes or offenses committed in federal or Indian lands are investigated and prosecuted through federal courts or Indian courts except in PL 280 states where state and local authorities have standing.<sup>37</sup> Federal civil law enforcement assets to police the vast stretches of Indian lands, national forests, and parks are limited. Many of these areas exist in sparsely populated austere areas of the United States characterized by limited infrastructure to support command and control, with limited access by motor vehicles. These areas have to be traversed by foot, 4-wheel vehicle, horse, or aircraft. Department of Defense assets are, or can be used, to assist civil law enforcement to project civil authority into ungoverned spaces. Since 1989, the U.S. Military has been granted the authority to provide support and equipment to civil law enforcement to assist in the war on drugs. The U.S. Military have been in a support role and not allowed the authority to act alone as a primary police enforcing agency.

A final sub-topic to secondary question two is the examination of the Posse Comitatus Act and recent Bush era legal decisions that have defined the authority for the

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<sup>36</sup>Imre Sutton, Sovereign States And The Changing Definition of the Indian Reservation, *The Geographical Review*: 281-290.

<sup>37</sup>*Ibid.*, 289.

use of military force to combat terrorist activities within the United States. Immediately after the attacks on our country on September 11, 2001, President George W. Bush asked the United States Department of Justice to render a legal opinion on the use of U.S. military forces against international or foreign terrorists operating within the United States. The United States has used the military since the beginning of our nation to augment civil law enforcement. Troops were routinely called upon to bolster the combat power of local and federal Poses. This led to the enactment of the Posse Comitatus Act of 1878, which was codified into Title 18 U.S.C. section 1385. The Posse Comitatus Act was intended to keep local and federal law enforcement authorities from commandeering the military garrison into a posse and pressed into service as police officers (a posse) in the post-reconstruction South after the Civil War.

The final secondary question in this methodology identifies gaps in the ability of law enforcement to project civil authority into ungoverned spaces. The gap in the National Security Strategy to “prevent and deter attacks by interdicting threats, denying hostile actors the ability to operate within our borders and protect the nation’s critical infrastructure” lies in the ability of law enforcement to project civil authority into ungoverned areas in the United States.<sup>38</sup> This thesis will examine the limitations of the National Guard and Reserves in the ability to fill these gaps within the United States. Recent legal decisions as a result of 9/11 World Trade Center bombings and Hurricane Katrina have expanded the use of the U.S. Military as a police force inside of the U.S. So under these current guidelines would it be a far stretch to see the President utilizing the U.S. military to interdict, apprehend, and prosecute foreign terrorists conducting terrorist

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<sup>38</sup>The White House, *National Security Strategy*.



operations against US Persons (USPERs) inside the US? What about a Beslan or Mumbai type scenario (see discussion in chapter 1) where local, state and federal authorities are faced with multiple complex wicked tactical problems in separate jurisdictions or large geographic locations with the need for armored vehicles, rotary wing support and large numbers of personnel to secure the locations? What happens in another Waco scenario when civil federal authorities do not have enough personnel, the proper equipment or logistical support to sustain a 51 day siege operation or longer? Can the military do more than just provide equipment to support federal authorities' efforts?

The author will discuss his findings in chapter 4 based on his research methodology described in this chapter and the literature discussed in chapter 2. The author will answer his primary, and secondary research questions posed in this chapter with his findings in chapter 4. Based on the author's findings, he will present his conclusions and recommendations in chapter 5 on how to project civil authority into America's uncontrolled spaces.

## CHAPTER 4

### ANALYSIS

Throughout history and separated by ocean voyage, the United States enjoyed a relative isolation from the perils of European conflict. With the passage of time, improvements in intercontinental travel and globalization this is no longer true. Since entering the international economic community, the United States struggled with projecting power and civil authority into ungoverned spaces. As the United States expanded westward, the military provided support support to civil authorities and enforced the law. Our nation's military forces have always provided civil authorities with the additional capacity to project the rule of law and national power.<sup>39</sup> The separation of police powers within the United States set forth in the U.S. Constitution's 10th Amendment has created fragmented levels of legal jurisdictions.<sup>40</sup>

The separation of powers was designed by the writers of the U.S. Constitution as a means of checks and balances for our government. The founding father's desire to preserve a separation of powers between the states' rights and national policy has left the United States with layers of federal, state, tribal, and local sovereignty. These layers have a limitation of jurisdiction and authority that create gaps in law enforcement coverage in parts of the United States creating ungoverned spaces.

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<sup>39</sup>Department of Justice, 4-12.

<sup>40</sup>O'Connor.

The vast research on ungoverned spaces by the United States Government (USG) and by the U.S. Department of Defense (DoD) focuses on the projection of power beyond U.S. borders into other countries.

1. The Department of Defense and the USG both recognize ungoverned spaces as posing threats to national security and creating potential safe havens for criminal organizations, terrorists and illicit activities . . . in other countries. In a speech given at the Center for Strategic and International Studies (CSIS) by Michele Flournoy the Under Secretary for Policy, U.S. Department of Defense, she cited five key security challenges facing the U.S. Department of Defense. Fourth in priority by Ms. Flournoy was the threat from weak or failed foreign nation states that created ungoverned spaces for terrorists, criminals, and illicit activities to flourish.<sup>41</sup> Dr. Max Manwaring of the U.S. Army Strategic Studies Institute believes that ungoverned areas present an attractive location for Transnational Criminal Organizations (TCOs) to use local gangs to exert control through intimidation or corruption, unaffected by law enforcement.<sup>42</sup> Dr. Manwaring refers to Mexico, Central and South America. Yet, through extensive research none of the reports, monographs or dissertations referring to the vast ungoverned spaces that exist inside the United States. Up until 2007 U.S. policymakers referred to ungoverned territories [ungoverned spaces] as a security problem, but there had been no concerted effort to define and analyze them as a separate and unique category of security

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<sup>41</sup>Michele Flournoy, "Rebalancing the Force: Major Issues for QDR 2010, " *Federal News Service* (2009): 4-6.

<sup>42</sup>Max G. Manwaring, *A Contemporary Challenge to State Sovereignty* (Carlisle, PA: Strategic Studies Institute, 2007).

challenges.<sup>43</sup> Ungoverned territories share similar characteristics across all of the countries the USG studied.

Mr. Rabasa found that ungoverned territories lacked penetration of state institutions like sewer, water treatment, or government offices into general society. Other organizations or individuals such as warlords, mullahs, or insurgent groups may provide daily governance.<sup>44</sup> He identified an important factor in ungoverned territories as inaccessibility. He defined inaccessibility in ungoverned territories as often found in difficult terrain: mountains, jungles, or desert. These areas are generally sparsely populated, economically depressed setting conditions that impeded economic development and deter the nation state's tendency to develop the necessary infrastructure to maintain the nation states' presence.<sup>45</sup> Rabasa cited the presence of institutional and personal corruption leading to the delegitimizing of the national state and affecting security as another factor. The resistance to the nation state's authority by ethnic groups, tribes or extended families as characterized by papers written on ungoverned territories in Africa and Afghanistan as another characteristic of ungoverned spaces.<sup>46</sup>

Common to all of the ungoverned spaces was the presence of armed groups that operate outside the nation state's control, as a major indicator of the extent the territory is ungoverned. These groups' activities tend to weaken and corrupt the political and social

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<sup>43</sup>Rabasa, 2-3.

<sup>44</sup>Ibid., 3.

<sup>45</sup>Ibid.

<sup>46</sup>Ty L. Groh, "Ungoverned Spaces The Challenges of Governing Tribal Societies" (Thesis, Naval Post Graduate School, Monterey, CA, 2006); Rabasa et al., "Ungoverned Territories."

institutions when they are involved in trafficking of drugs or extortion.<sup>47</sup> The presence of criminal networks which will develop opportunistic working relationships with terrorist or insurgent organizations as well as the wide spread access to weapons represent a challenge to the nations state's monopoly of the legitimate use of force.<sup>48</sup>

2. Rabasa's description of ungoverned territories applies to the United States, as the U.S. has thousands of miles of border with Mexico and Canada policed by a patchwork of federal, state, local, and Tribal authorities. There is 1,951 miles of border between the U.S. and Mexico, only 652 miles of non-contiguous fencing or vehicle barriers between San Diego, California and El Paso, Texas.<sup>49</sup> Electronic sensors and Border Patrol Agents patrolling the gaps supplement existing fence. Referring to Rabasa's characterization of ungoverned territories, the southwest border along Mexico dominated by inaccessible, open desert, containing wild life refuges, national parks, Indian lands and in places mountainous areas qualifies as ungoverned.<sup>50</sup> The southwest border is sparsely populated in many of the areas in southern Texas, New Mexico and Arizona along the Mexican border, with population centers existing at the few major crossing points between Mexico and the U.S.

3. The lack of physical infrastructure and accesibility of Indian lands and national parks in Arizona, and New Mexico, which constitutes ungoverned territory as described

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<sup>47</sup>Rabasa, 4.

<sup>48</sup>Ibid.

<sup>49</sup>"Southwest Boarder Construction Progress," [http://cbp.gov/xp/cgov/border\\_security/ti/ti\\_news/sbu\\_fence/](http://cbp.gov/xp/cgov/border_security/ti/ti_news/sbu_fence/) (accessed April 13, 2012).

<sup>50</sup>National Park Service, [http://nps.gov/news/upload/NPS-Park-listing\\_11-7-11.pdf](http://nps.gov/news/upload/NPS-Park-listing_11-7-11.pdf) (accessed May 15, 2012).

by Rababsa allows the presence of narcotics traffickers, conducting armed incursions across our borders from Mexico to facilitate their smuggling of narcotics, money and humans further typifies our Southwest border area as an ungoverned space.<sup>51</sup>

The Southwest border of the United States gets most of the attention from the press, but the United States has 13 Northern states that share a common border with Canada. The United States border with Canada is 3,987 miles long, and the Canadian border with Alaska alone is 1,538 miles long. That's a total of 5,525 miles of unfenced and undefended border, the largest nonmilitarized border in the world.<sup>52</sup> The U.S., Canadian border is not without security issues, quite the contrary drug smuggling, criminal organizations, corruption and terrorists threats are a major concern there as well.<sup>53</sup> The rise in border violence and criminal activity across the Canadian and U.S. border is increasing with larger profits to be made smuggling drugs, guns and money.

In 2006 Government Accounting Office (GAO) investigators conducted an exercise on the accessibility of the U.S. northern border from Canada. GAO investigators were able to cross the Canadian border into the United States with a duffle bag containing items that looked like radioactive material and according to their report, never

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<sup>51</sup>CNN, "Border Patrol Agent Slain while responding to incursion," 1-2; Nick Valencia, "Shots Fired Into Mexico by U.S. Boarder Patrol Agents," *CNN*, September 13, 2010, [http://articles.cnn.com/2010-09-13/justice/texas.mexico.shots.fired\\_1\\_border-patrol-agents-marijuana-seizure-ciudad-juarez?\\_s=PM:CRIME](http://articles.cnn.com/2010-09-13/justice/texas.mexico.shots.fired_1_border-patrol-agents-marijuana-seizure-ciudad-juarez?_s=PM:CRIME) (accessed April 14, 2012).

<sup>52</sup>Janice Cheryl Beavers, *U.S. International Borders: Brief Facts* (Washington, DC: Congression Reasearch Group, 2006).

<sup>53</sup>*USA Today*, "Anti-Drug efforts beefed up along U.S.-Canada border, July 26, 2009, [http://www.usatoday.com/news/nation/2009-07-25-border-security\\_N.htm](http://www.usatoday.com/news/nation/2009-07-25-border-security_N.htm) (accessed May 15, 2012).

encountered a law enforcement officer. GAO investigators video taped their ability to carry a gym bag across the U.S. and Canadian border 3 times without being interdicted. On one occasion a concerned citizen called the Border Patrol to report them, but the Border Patrol was unable to locate the rental car GAO investigators were using in the test of law enforcement response.<sup>54</sup> The report specifically identified several vulnerabilities on federally managed lands where Customs Border Protection (CBP) has no control.<sup>55</sup>

The GAO report completed in December 2010 entitled *Border Security: Enhanced DHS Oversight and Assessment of Interagency Coordination Is Needed for the Northern Border*, stated the northern border was more secure than it had been since 2007, but continued oversight by DHS was needed. The GAO report specifically noted that the Northern U.S. border remains vulnerable to illicit activities, trafficking and possible exploitation by terrorists.<sup>56</sup> The sparse population and extensive stretches of wilderness characterize the U.S. Northern border as an ungoverned space according to Rabasa's universally accepted definition.<sup>57</sup>

The U.S. Northern border is one of many ungoverned spaces. There are 58 National Parks, and 193 million acres of National Forests and grasslands across the

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<sup>54</sup>Kevin Bohn, "Report: Security on U.S.-Canada border fails terror test," *CNN U.S.*, [http://articles.cnn.com/2007-09-27/us/border.security\\_1\\_border-northern-border-radioactive-material?\\_s=PM:US](http://articles.cnn.com/2007-09-27/us/border.security_1_border-northern-border-radioactive-material?_s=PM:US) (accessed May 12, 2012).

<sup>55</sup>Ibid.

<sup>56</sup>Government Accounting Office, GAO-11-97, *Border Security: Enhanced DHS Oversight and Assessment of Interagency Coordination Is Needed for the Northern Border* (Washington, DC: Government Printing Office, 2010), 1-9.

<sup>57</sup>*USA Today*, "Anti-Drug efforts beefed up along U.S.-Canada border. July 26, 2009, [http://www.usatoday.com/news/nation/2009-07-25-border-security\\_N.htm](http://www.usatoday.com/news/nation/2009-07-25-border-security_N.htm) (accessed May 15, 2012).

United States, many of which are also located in remote, sparsely populated and difficult to access within the United States.<sup>58</sup> The National Park Service employs 22,000 full time and seasonal employees for 84 million acres of parks, national monuments, battlefields and military parks.<sup>59</sup> The National Park Service manages 17 border parks that encompasses 810 miles of land along the Canadian, Mexican and south Florida borders, or 14 percent of the land on the Canadian border and 40 percent of the land on the Southwest border.<sup>60</sup>

The National Forest Service employs approximately 30,000 employees for its 600 Ranger Districts.<sup>61</sup> The National Forest Service manages 944 miles of federal lands that border Canada, and another 52 miles of federal land along the Mexican border. The National Forest Service maintains 23.8 million acres of National Forests within 50 miles of the Mexican and Canadian border with 695 full time law enforcement officers.<sup>62</sup> That gives the National Forest service one employee for every 6,433 acres and the National Park Service one employee for every 3,818 acres. The National Park Service maintains approximately 4,000 Park Service Rangers, only 1,500 of those Rangers are actual law enforcement officers charged with law enforcement functions for the National Park

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<sup>58</sup>National Forest Service, *A Career in Natural Resource Law Enforcement*, 2006; [http://www.fs/fed/us/lei/jobs\\_page.html](http://www.fs/fed/us/lei/jobs_page.html) (April 15, 2012); National Park Service, "Frequently Asked Questions," <http://www.nps.gov/faqs.htm> (accessed May 12, 2012).

<sup>59</sup>*Ibid.*

<sup>60</sup>*Ibid.*

<sup>61</sup>National Forest Service, *A Guide to Your National Forests and Grassland: America's Great Outdoors* (Washington, DC: U.S. Department of Agriculture).

<sup>62</sup>*Ibid.*



Service's 84 million acres of parks. The National Park Service is responsible for the protection of 22 parks along international borders, which has increased their role in Homeland Security issues.<sup>63</sup> The National Park Rangers have increasingly encountered drug cartels growing marijuana on national land as well as experiencing a growing number of threats and assaults since 2010.<sup>64</sup>

The National Forest Service (NFS) has approximately 800 law enforcement officers to secure and police 191 million acres of national forests and grasslands across the United States.<sup>65</sup> Given the remote and inaccessible nature of those areas, not enough employees to project civil authority into those federally controlled lands.

In conclusion, the United States has millions of acres and thousands of miles of ungoverned territory that it attempts to project civil authority in with a wide patch work of separate federal, state and Tribal law enforcement entities. These ungoverned territories, or spaces are areas that criminal networks now operate in, and could provide a safe haven for sleeper cells or terrorist activities.

The nature of how much uncontrolled territory has now been examined in the paragraphs above. The next secondary research question this author believes needs to be addressed is how many law enforcement agencies does the United States have to project civil authority? Then, what are the jurisdictional restrictions on those entities?

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<sup>63</sup>Craig Welch, "Park Rangers' jobs increasingly dangerous," January 2, 2012, [http://seattletimes.nwsources.com/html/localnews/2017147696\\_parkpatrol03m.html](http://seattletimes.nwsources.com/html/localnews/2017147696_parkpatrol03m.html) (accessed May 12, 2012).

<sup>64</sup>Ibid.

<sup>65</sup>USDA Forest Service, "A Career in Natural Resource Law Enforcement," 2006, [http://www.fs.fed/us/lei/jobs\\_page.html](http://www.fs.fed/us/lei/jobs_page.html) (April 15, 2012).

The Author will examine the Federal organizations responsible for denying terrorists, and criminals the ability to operate in the vast ungoverned territories within the U.S. and how jurisdictional restrictions pose operational constraints to law enforcement efforts. The primary federal agency responsible for homeland security is of course, the DHS.<sup>66</sup> DHS uses its Customs and Border Protection (CBP) as its primary tool for protecting our borders, interdicting criminal elements illegally attempting to enter the U.S. and stemming illegal immigration.

The U.S. Border Patrol is a subordinate agency to the CBP. The National Forest and the National Park Service both maintain uniformed law enforcement officers to patrol their jurisdictions, but their authority is limited to their respective law enforcement functions in the parks or forests. National Park Service and National Forest Service officers provide high visibility uniformed patrol presence and prompt response to public and employee safety incidents and violations of the law or regulations. Historically, the CBP did not operate in National Forests, or parks and the National Park Service and National Forest Service Police did not enforce immigration laws.<sup>67</sup> Recent success of CBP's law enforcement efforts on the border crossings have forced smugglers and illegal immigration into public lands like National Forests and Parks.

To complicate this situation further, the Bureau of Indian Affairs Police (BIA) only have authority on Indian lands over Indian affairs. Other than the Federal Bureau of Investigation (FBI) and the U.S. Marshals Service (USMS) no other federal law

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<sup>66</sup>Department of Homeland Security, Website, <http://www.dhs.gov/index.shtm> (accessed May 15, 2012).

<sup>67</sup>CBP.gov, Website, [http://www.cbp.gov/xp/cgov/about/history/legacy/bp\\_histocut](http://www.cbp.gov/xp/cgov/about/history/legacy/bp_histocut). (accessed May 15, 2012).

enforcement entity has jurisdictional authority to investigate serious crimes on Indian lands and can make arrests there.<sup>68</sup> BIA Police provide uniformed patrol for calls for service, the FBI investigates serious assaults, murders, and corruption.<sup>69</sup> The U.S. Marshals Service apprehends all fugitives and sex offenders who fail to report their change of residence.<sup>70</sup> State law enforcement authorities do not have statutory authority to patrol or investigate federal statutes on federal lands, even if those properties reside within their state boundaries.

Indian Lands are subject to a separate sovereignty that precludes the ability of state and local authorities from projecting the state's authority to its inhabitants unless those entities have standing agreements. Indian Lands are considered a federal protectorate, domestic dependant nations that although they reside geographically within the United States, have the authority to govern themselves.<sup>71</sup> Six states within the United States have taken state control of the jurisdiction of Indian lands within their geographical boundaries under the 1953 Federal Public Law 280, 14 other states exercise control or dominion over some Indian lands under other laws.<sup>72</sup>

The fractured jurisdictional structure built by our founding fathers will cause a gap in the ability of the law enforcement to project civil authority into these remote and

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<sup>68</sup>US Department of the Interior Indian Affairs.

<sup>69</sup>Federal Bureau of Investigation 2002-2005.

<sup>70</sup>U.S. Marshals Service, "Fugitive Operations," [http://www.usmarshals.gov/duties/factsheets/fugitive\\_ops-2012.pdf](http://www.usmarshals.gov/duties/factsheets/fugitive_ops-2012.pdf) (accessed May 12, 2012).

<sup>71</sup>Sutton, *Sovereign States and The Changing Definition of the Indian Reservation*, 283.

<sup>72</sup>*Ibid.*, 289-291.

difficult to reach areas of the United States. The geographical locations, the lack of highway or road infrastructure and sparse population areas make these areas ideal locations for criminal and illicit activity. The CBP has increased its patrol presence along the Southwest border to 17,700 Border Patrol agents for nearly 2,000 miles of U.S.-Mexico and 2,200 CBP agents along the nearly 4,000 mile U.S.- Canadian border.<sup>73</sup> An additional 1,200 National Guard troops are annually deployed along the Southwest border to support DHS in detecting and locating illicit criminal activity. These National Guard troops, operating under the title 32 authority in support of law enforcement have no authority to detain or arrest suspects they detect during criminal activity. They have to report this activity to the civil authorities for apprehension or action. Beginning in January 2012, the DoD will draw down the number of National Guard ground based troops on the Southwest border supporting the CBP. The National Guard will be reduced to 300 personnel, who will support the border mission in air related missions.<sup>74</sup>

In 2007, the U.S. Forest Service conducted a study in conjunction with Oregon State University of law enforcement concerns and trends for the United States Department of Agriculture (USDA).<sup>75</sup> A major concern of NFS law enforcement officers was the shortage of law enforcement officers (LEOs) and Forest Protection Officers. Although most NFS officer's responding had cooperative law enforcement agreements

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<sup>73</sup>Customs Border Patrol 2011.

<sup>74</sup>Mike M. Ahler, "Administration to draw down Natinal Guard troops on Southwest border," *CNN*, December 20, 2011, [http://articles.cnn.com/2011-12-20/us/us\\_border-national-guard\\_1\\_national-guard-troops-border-patrol-security?\\_s=PM:US](http://articles.cnn.com/2011-12-20/us/us_border-national-guard_1_national-guard-troops-border-patrol-security?_s=PM:US) (accessed May 14, 2012).

<sup>75</sup>Deborah J. Chavez and Joanne F. Tynon, *Forest Service Law Enforcement Officer Report: Nationwide Study* (Washington, DC: Department of Agriculture, 2007).

with county sheriff's offices for assistance, NFS officers did not believe that these services were adequate in responding to or preventing crime.<sup>76</sup> NFS officers were dissatisfied that they had to depend on state and local LEOs to enforce state violations codes. They saw a need to be cross-deputized to enforce state codes and believed the Code of Federal Regulations (CFR) was outdated and hampered their effectiveness.<sup>77</sup> A large number of the NFS LEOs who responded complained that they did not have adequate resources to do their jobs, with more personnel and equipment topping the list of needed resources.<sup>78</sup> In contrast, the U.S. deployed 288,734 U.S., Coalition, and Iraq troops for 169,235 square miles of Iraq to provide civil governance in 2008.<sup>79</sup> According to an article published by Steven M. Goode, titled "A Historical Basis for Force Requirements in Counterinsurgency" and current Army Counterinsurgency doctrine, there is no fixed predetermined ratio of friendly troops to enemy combatants. The number of friendly forces should be determined through a ratio of friendly troops to inhabitants. Most density ratios fall in the range of 20-25 friendly forces to every 1,000 inhabitants.<sup>80</sup> Using this force ratio in comparison to the number of federal law enforcement officers

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<sup>76</sup>Ibid., 1-14.

<sup>77</sup>Ibid.

<sup>78</sup>Ibid.

<sup>79</sup>Amy Belasco, *Troop Levels in Afghan and Iraq Wars, FY2001-FY2012: Cost and Other Potential Issues* (Washington, DC: Congressional Research Service, 2009).

<sup>80</sup>Steven M. Goode, "A Historical Basis for Force Requirements in Counterinsurgency," *Parameters* (Winter 2009): 45-47; US Department of the Army, Field Manual (FM) 3-24/MCWP 3-33.5, *Counterinsurgency* (Washington, DC: Government Publishing Office, 2006).

available to police federal lands, the National Park Service, National Forest Service, BIA, and the CBP are drastically understaffed.

The policing of Indian lands pose special considerations for law enforcement and Homeland Security. In 2008 the U.S. Department of Justice reported that American Indian tribes operated 178 law enforcement agencies that employed at least one full-time sworn officer. The Tribal authorities fielded 3,000 sworn officers for 300 federal reservation areas in the U.S., averaging 2.3 full time officers per 1,000 residents.<sup>81</sup> The significance of these figures is that in reservations such as the Navajo Nation encompassing Arizona, New Mexico, and Utah with area of 22,174 square miles there is 0.4 officers per 25 square miles.<sup>82</sup> The city of Kansas City, MO. is 313.5 square miles, with a population of 482,299 and 1,404 police officers. They have a ratio of 2.91 officers per 1000 population.<sup>83</sup>

Indian lands can present other unique law enforcement problems where they are located on national borders such as the Akwesasne tribal lands straddling the U.S. and Canadian borders in New York and the Tohono O'odham Indian reservation in Arizona on the Mexican border. Indian Reservations are economically depressed in nature and culturally marginalizing which create a population of people vulnerable to corruption.<sup>84</sup>

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<sup>81</sup>Brian A. Reaves, *Tribal Law Enforcement, 2008* (Washington, DC: Bureau of Justice Statistics, 2008), 1-3.

<sup>82</sup>*Ibid.*, 3.

<sup>83</sup>City-data.com, "Kansas City, MO," [www.city-data.com/city/kansas-city-missouri.html](http://www.city-data.com/city/kansas-city-missouri.html) (accessed May 15, 2012).

<sup>84</sup>Bree Spencer, Akwesasne: A Complex Challenge to U.S. Northern Border Security, *The National Strategy Forum Review* 20, no. 3 (2011): 34-37; National Drug

A 2010 National Drug Intelligence Center threat assessment identified drug trafficking organizations (DTOs) partnering with Indian DTOs utilizing Indian Lands for smuggling a threat to national security. Indian DTOs were identified as a threat because they circumvent detection and apprehension by law enforcement authorities of Mexico, the U.S. and Canada utilizing their sovereign territory.<sup>85</sup> This environment of open access to the U.S. Borders is clearly an example of ungoverned territories and a threat to national security.

The ability to project civil authority and the rule of law is severely diminished by the lack of manpower to provide protection to the community.

The United States Military is being used to supplement the U.S. effort to secure our nations' borders and ensure homeland defense. In 2006, President George W. Bush ordered 6,000 National Guardsman deployed to support the U.S. Border Patrol struggling to maintain security on the Southwest border. Dubbed Operation Jump Start, the National Guard operated surveillance systems, installed fences and vehicle barriers, built roads and provided training. The National Guard was deployed from 2006 to 2008 as Title 32 troops in support of the Border Patrol which served as the lead agency.<sup>86</sup>

Currently the U.S. Military is being used in support of law enforcement efforts along the U.S. borders by providing aerial, ground and electronic surveillance under the

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Intelligence Center, *U.S. Southwest Border Smuggling and Violence* (Washington, DC: U.S. Department of Justice, 2010).

<sup>85</sup>National Drug Intelligence Center.

<sup>86</sup>Michael Dale Doubler, *The National Guard on the Border Operation Jump Start 2006-2008* (Washington, DC: National Guard Bureau, Historical Services Division, 2008).

direction Joint Task Force North (JTF-N) counterdrug operations in Title 32 status.<sup>87</sup> The Southwest border is part of the JTF-N area of responsibility in providing support to counter drug operations for civil authorities. The use of military forces in support of civil operations such as disasters and in support of the war on drug trafficking along the U.S. Southwest border has been allowed since 1989 to supplement the capabilities of state, local, federal, and tribal authorities. The use of federal troops to conduct direct law enforcement operations has been restricted by the Posse Comitatus Act.

In the aftermath of the devastating 9/11 attacks President George W. Bush sought out a legal opinion to use the military within the U.S. to prevent or deter terrorist activity. In an October 2001 U.S. Department of Justice memorandum, titled “Authority for the use of Military Force to Combat Terrorist Activities Within the United States” U.S. Deputy Assistant Attorney John C. Yoo and Special Counsel Robert J. Delahunty found that he could. Specifically they wrote:

We conclude that the President has ample constitutional and statutory authority to deploy the military against international or foreign terrorists operating within the United States. We further believe that the use of such military force generally is consistent with constitutional standards, and that it need not follow the exact procedures that govern law enforcement operations.<sup>88</sup>

Moreover, that further stated:

September 11’s attacks demonstrate, however that in this current conflict the war front and home front cannot be so clearly distinguished – the terrorist attacks were

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<sup>87</sup>Mike Mount, “Officials: National Guard Troops Headed to Border Next Month,” *CNN U.S.*, July 19, 2010, [http://articles.cnn.com/2010-07-19/us/border.troops\\_1\\_border-patrol-tuscon-sector-border-agents?\\_s=PM:US](http://articles.cnn.com/2010-07-19/us/border.troops_1_border-patrol-tuscon-sector-border-agents?_s=PM:US) (accessed May 15, 2012).

<sup>88</sup>Department of Justice.



launched from within the United States against civilian targets within the United States.<sup>89</sup>

The characterization of the September 11, 2001 attacks against the United States as an act of war further opened the interpretation by the Bush Administration that U.S. troops could be committed in law enforcement operations within the U.S.

In the paragraphs above, the lack of law enforcement assets to project civil authority in the United States' ungoverned spaces has been demonstrated as a capabilities gap. The fractured geographic jurisdictional and manpower issues that keep the federal law enforcement agencies from working with a unity of effort exacerbate this gap. The 2010 National Security Strategy (2010 NSS) goals to secure the U.S. borders, deny our enemies sanctuary and the ability to operate within our country is more diminished than one would expect. The author has identified another national security gap that he believes needs to be addressed, the issue of a national tactical response unit for large-scale terrorist attacks, domestic terrorist compound sieges and wicked tactical responses. Examples of domestic terrorist compounds sieges are Ruby Ridge, Montana Freeman and Ed and Elaine Brown, New Hampshire tax protesters characterized by armed, organized U.S. citizens barricaded on compounds in remote areas of the United States.<sup>90</sup> The author defines wicked tactical problems as complex, unstructured events requiring the dedication of a large amount of law enforcement resources, law enforcement officers over an extended period of time, which requires the use of military resources, personnel

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<sup>89</sup>Ibid., 3-4.

<sup>90</sup>Pitcavage 1996; Southern Poverty Law Center, "NH Tax Protesters Arrested Without a Shot," *Intelligence Report* 128 (Winter 2007), <http://www.splcenter.org/get-informed/intelligence-report/browse=all-issues/2007/winter/tax-protesters> (accessed May 12, 2012).

and expertise to conclude the event. The Author believes that siege events such as the Branch Davidian compound in Waco, Texas, and the Beslan School Siege in Russia are wicked tactical problems.

The FBI is the primary agency responsible for the response and investigation of terrorism in the United States. The FBI maintains 56 field offices around the United States and its U.S. Territories, all 56 offices maintain local field office Special Weapons and Tactic (SWAT) teams.<sup>91</sup> The FBI also maintains the U.S.'s primary counterterrorist team, the Hostage Rescue Team (HRT) based in Quantico, Virginia. Each FBI field office maintains a SWAT team of 18-46 law enforcement special operators depending on the size of the FBI field office, for example the El Paso, Texas, FBI field office maintains an 18 person SWAT team and the New York, New York FBI field office maintains a 46 person SWAT team.<sup>92</sup> The FBI's HRT law enforcement special operators staffing numbers are not published, but are estimated under 500 personnel for the total unit including support elements.<sup>93</sup>

The size and scope of law enforcement operations at the Mt. Carmel Branch Davidian Compound required the combined law enforcement response of several hundred law enforcement officers and agents of federal, state and local Sheriff's departments. The available number of FBI HRT specialized SWAT professionals used to sustain the Waco siege was only 50 men. The number of FBI HRT agents needed for such an event and

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<sup>91</sup>Federal Bureau of Investigation.

<sup>92</sup>Ibid.

<sup>93</sup>Gina Cavallaro, "The Quiet Professionals," *Training and Simulation Journal* 10, no. 1 (February-March 2009): 14-18.

maintain readiness for other law enforcement needs for another part of the U.S. is insufficient.<sup>94</sup> The Beslan, Russia school siege conducted by Chechen Rebels required the response of the Russian military and Spetznaz special forces, local Russian law enforcement authorities were immediately over whelmed by the tactical hostage rescue problem. The large numbers of heavily armed hostage takers (32), complicated by the large numbers of hostages (1,100) and the technical skills needed to breach the complex mined obstacles did not exist in the local authorities.<sup>95</sup> In both circumstances, Beslan and Waco law enforcement responses required the assistance of military forces to bring the terrorist event to a conclusion. Both incidents suffered problems with a unified command stemming from the lack of a clear cut authority to command all forces at the scene.<sup>96</sup>

The U.S. military has been deployed in Afghanistan and Iraq for the last ten years solving complex, unstructured , wicked problems in the similar ungoverned territories as described in this thesis applied to the United States. The author believes U.S. Forces can be deployed in ungoverned spaces in the United States to augment law enforcement as law enforcers, bringing manpower, resources and civil authority.

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<sup>94</sup>Philip B. Heymann, *Lessons of Waco: Proposed changes in Federal Law Enforcement* (Washington, DC: Department of Justice, 1993).

<sup>95</sup>*The Guardian*, "Timeline: The Beslan school siege," September 6, 2004, <http://www.guardian.co.uk/world/2004/sep/06/schoolsworldwide.chechnya/print> (accessed May 12, 2012).

<sup>96</sup>Radio Free Europe/Radio Liberty, "Beslan Rescue Lacked Direction, Says Ex-FSB Head," <http://www.rferl.org/articleprintinterview/1063904.html> (accessed May 12, 2012); Heymann.

## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

#### Conclusions

It is irrefutable that in the United States there are thousands of square miles of ungoverned spaces, spread along both national borders, multiple states, in various jurisdictions creating a national level problem for law enforcement. The resolution of this national security problem rests not with each state law enforcement agency but with the federal government.

The primary research question in this thesis is how can law enforcement project civil authority into ungoverned spaces within the United States? In attempting to answer that question, three secondary questions have been addressed. The first question addressed is “what are ungoverned spaces within the United States?” Second, “What are the organizational layers of Federal law enforcement organizations and their jurisdictional restrictions and limitations?” Third, “What are the roles of federal authorities in projecting civil authority into such ungoverned spaces as National Forests, National Parks, International borders, and Indian lands?” Fourth, “What are the gaps in federal law enforcement’s ability to project civil authority into ungoverned spaces?”

What are ungoverned spaces within the United States? In addressing the first secondary question, the author relied on existing scholarly articles, DoD, and other reports written by contracted governmental researchers that defined ungoverned spaces or territories as they applied to foreign countries. All of these resources were outward looking, none focusing on the vast spaces within the United States that seemed obviously similar in description and definition. Other scholarly articles, monographs, thesis’ and

news articles address ungoverned spaces, but look specifically at the U.S. Southwest border and Posse Comitatus issues as they relate to the use of the U.S. Military to provide assistance law enforcement, defined the border as a dangerous place, a safe haven to Drug Trafficking Organizations (DTOs) and a national threat.

No one is voicing a concern that this area, ungoverned by Rabasa's definition and a safe haven for criminal activity and terrorists, flies in the face of the NSS. Certainly numerous studies by the GAO, reports by the Congressional Research Service (CRS) and other governmental agencies have identified specifically the southern and northern borders of the United States as porous, a threat of exploitation by DTOs and terrorists. The creation of the U.S. Department of Homeland Security and the increase in manpower of the U.S. Customs Border Protection increases the security of our borders. However, the U.S. government recognizes additional CBP agents are not enough to stem the threat and has augmented them with U.S. Military forces in a supporting role. National Guard troops deployed to the Southwest border under Title 32 provide the CBP with intelligence, surveillance, and air assets to accomplish their border protection mission.

The lack of manpower, resources, infrastructure and the ability to project civil authority on a daily basis into National Parks, Forests, and Indian Lands create additional areas within the United States and its borders where the U.S. is vulnerable to penetration and exploitation by criminals or terrorist groups. Department of Justice studies and research compiled by these federal agencies show the inability consistently to project civil authority into these areas, as well as the need for additional manpower and resources. The Forest Service in particular identified that augmenting their areas of responsibility with county and state law enforcement officers was not beneficial to the

deterrence of criminal activity. Jurisdictional friction enforcing the Uniformed Code of Federal Regulations, state and county laws cause gaps in law enforcement services and capabilities where multiple county, state and federal or tribal jurisdictions overlap. The U.S. National Parks, Forests, borders, and Indian Lands have become safe havens for criminal enterprises to operate in or transit through, thereby endangering public safety, and national security.

The next secondary research question is “what are the organizational layout of Federal law enforcement organizations and their jurisdictional restrictions?” Question two tackles the issues of the limitations of manpower and the statutory jurisdictions of the federal agencies entrusted with the protection of the United States. The CBP, the National Park Service, Forest Service, and the Bureau of Indian Affairs that manage U.S. Indian lands statutorily and by function have different missions as well as areas of responsibility. Although the CBP’s area of responsibility for their function of border protection crosses numerous Indian lands, National Parks and Forests the CBP mission is not to enforce the federal statutes governing those areas.

Bureau of Indian Affairs police, unless deputized by the state, local or federal entities, do not have the authority over non- Indians persons or policing authority outside their sovereign nation. The National Park Service and Forest Service have statutory authority over specific laws that govern their missions and area of responsibilities in the national parks and forests. Unless deputized by the state, local, or other federal authority, they do not have jurisdiction outside of those geographic locations. The layers of law enforcement and the lack of jurisdictional integrity create an environment of ungoverned

spaces. The boundaries of National Parks and Forests do not bound the sovereignty of Indian lands, but extend over vast areas that often encompass more than one state.

All of these separate law enforcement entities' jurisdictions overlap other state, local and federal jurisdictions. The separation of law enforcement operations, jurisdictions, and missions create friction, which in turn creates gaps in the ability of the U.S. government to consistently project its authority within the U.S. Other countries have created Paramilitary law enforcement agencies in response to the need for a law enforcement entity that can operate in this environment such as the Carabinieri in Italy and the Guardia Civil in Spain.<sup>97</sup> The Carabinieri and the Guardia Civil are paramilitary police agencies that are normally deployed in remote areas with heavier weapons than their urban police counter parts. As a result, the United State's history with British government oppression and abuse of power, America created a balance of power comprised of a three branches of government. Over the years, due to the U.S. government's need to project its authority, federal law enforcement and regulatory agencies were created within those branches of government by function. The separation of functions created gaps in the logical lines of effort in projecting civil authority across these separate federal missions and functions.

The U.S. military has traditionally filled the gaps in the ability of U.S. federal law enforcement officials' capacity to project civil authority. From 1854 to 1878, the U.S. Army functioned as a national police force during the Reconstruction of the U.S.

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<sup>97</sup>Scott Stewart, "Mexico's Plan to Create a Paramilitary Force," *Stratfor Global Intelligence*, April 19, 2012, [http://www.stratfor.com/weekly/mexicos-plan-paramilitary-fo...sweekly&utm\\_content=readmore&elq=ble43e8e743f4dcf97066efed](http://www.stratfor.com/weekly/mexicos-plan-paramilitary-fo...sweekly&utm_content=readmore&elq=ble43e8e743f4dcf97066efed) (accessed May 12, 2012).

Southern states after the Civil War. During this time United States Marshals and Sheriffs could summon a posse Comitatus including both regular troops and militia to help enforce the Fugitive Slave Act of 1850.<sup>98</sup> Sheriffs and U.S. Marshals regularly summoned U.S. military forces, under the command of their officers into their service. The abuse of the military as the nation's police force after the U.S. Civil War caused Congress to pass the *Posse Comitatus Act of 1878* prohibiting the use of the U.S. Army, and by extension the Air Force from being used as a domestic police force.<sup>99</sup> The Posse Comitatus Act does not apply to the state's National Guard forces while deployed in State Guard, and Title 32 status. The President of the United States can deploy Title 10 federal troops to quell civil disorders or riots under the Insurrection Act. The United States Coast Guard, a subordinate directorate of DHS is both an armed force and a law enforcement agency with law enforcement powers is not included in PCA.<sup>100</sup>

In his thesis titled "The Military, Domestic Law Enforcement, and Posse Comitatus: Time for Change" at the Air Command and Staff College in April 2000, Major Steven L. Miller linked the 1980s U.S. Anti-drug policies to the erosion of the PCA in his research.<sup>101</sup> The next decade of new laws passed by congress provided legal exceptions to the PCA that allow the military to provide equipment, training and support

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<sup>98</sup>John R. Brinkerhoff, "The Posse Comitatus Act and Homeland Security," *Journal of Homeland Security* (February 2002), <http://www.homelandsecurity.org/journal/articles/brinkerhoffpossecomitatus.htm> (accessed May 12, 2012), 2-4.

<sup>99</sup>Ibid.

<sup>100</sup>Ibid., 5.

<sup>101</sup>Major Steven L. Miller, "The Military, Domestic Law Enforcement, and Posse Comitatus: Time for Change" (Thesis, Air Command and Staff College, April 2000), 4-9.



to civilian law enforcement. Major Miller noted that the DoD establishment of Joint Task Force -6 (JTF-6) in 1989 to coordinate joint military and civilian law enforcement anti-drug operations along the U.S. and Mexican border was an important event in the use of Active Duty and Reserve U.S. military forces to interdict and defend the U.S. border against drug traffickers.<sup>102</sup> This was the first time the U.S. military was tasked by the President to coordinate joint military and civilian law enforcement anti-drug operations along the U.S. Southwest border. Miller states that by 1995 President Clinton had dramatically increased the DoD's Anti-drug budget by 2850 percent and committed more than 8,000 Active Duty, Reserve and National Guard military personnel to domestic anti-drug missions.<sup>103</sup> The National Guard was involved with approximately 1,300 counter drug missions that year with the commitment of nearly 4,000 supporting soldiers.<sup>104</sup>

General Barry McCaffery, the Drug Czar for the United States in 1995, argued, "the military is the best option for no other reason than the military possesses the training, equipment, advanced technology, and command and control structure that surpasses any civilian agency."<sup>105</sup> This author concluded through this analysis that the use of the U.S. military as historically shown has been a necessary element in America's ability to project civil authority into ungoverned spaces within the United States and is unlikely to change as an effective tool for protecting this country.

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<sup>102</sup>Ibid., 10-12.

<sup>103</sup>Ibid., 12.

<sup>104</sup>Ibid.

<sup>105</sup>Ibid., 13.

The Department of Justice legal opinion specifies that the PCA applied to the domestic use of the Armed Forces for law enforcement purposes, but not for its performance of military functions. Mr. Yoo and Delahunty argued that the PCA contained an exception to the use of the military when constitutionally or statutorily authorized, which they argued had occurred with the attacks by foreign terrorists on U.S. soil.<sup>106</sup> Mr. Yoo and Delahunty further argued that the terrorist organization Al-Qaeda was waging “war” on the U.S. military, diplomatic and and citizens. The Department of Justice memorandum further characterized that the scale of violence involved during the September 11’s attack removed it from the sphere of operations designed to enforce the criminal laws. The legal and constitutional rules governing law enforcement operations are not applicable, “or not mechanically so,”<sup>107</sup> therefore opening the door to the use of military forces within the U.S. against terrorists.

The final secondary research question the author addressed was what are the gaps in the ability of law enforcement to project civil authority into ungoverned spaces? In chapter 4, the author outlined the lack of manpower and resources to project civil authority into the U.S. Borders, and federal lands. The austere and inaccessible nature of large portions this country’s border areas, National forests and parks has created gaps in the ability of federal law enforcement officers charged with their protection to accomplish the mission. The addition of U.S. troops in support of the efforts to secure our borders, and support law enforcement efforts inside the U.S. is an expensive measure to

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<sup>106</sup>Department of Justice, 1-2.

<sup>107</sup>Ibid., 4.

gap manpower shortages at a cost of \$120 million dollars per year.<sup>108</sup> Although uniquely capable and experienced at operating in this environment, the military is hampered in its ability to provide anything more than support to the small numbers of federal law enforcement officers because of the PCA limitations.

The gap the author has experienced during his 34 years in law enforcement is the ability of federal law enforcement to provide a unified tactical response to large domestic siege incidents within the United States. Historically the author has seen U.S. federal law enforcement create task forces of federal tactical teams to address these sieges, which consisted of tactical teams made up of part time operators whose primary duties are to conduct criminal investigations. The Wounded Knee (1971), Ruby Ridge (1992) and Waco Branch Davidian (1993) sieges are examples of large federal law enforcement responses cobbled together as a taskforce with part time federal tactical teams. Waco and Ruby Ridge had the FBI Hostage Rescue Team (HRT) deployed, which lacked sufficient numbers of full time team members to address the large-scale tactical problem.<sup>109</sup> In the 1993 Department of Justice report of the Waco, TX incident lessons learned by Philip B. Heymann, the Deputy Attorney General found that the FBI HRT was not sufficiently manned for such large tactical operations; they would still need the support of other similar units for support and perimeter security.<sup>110</sup> The FBI HRT has deployed to more

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<sup>108</sup>Mike M. Ahler, “Administration to draw down Natinal Guard troops on Southwest border,” *CNN*, December 20, 2011, [http://articles.cnn.com/2011-12-20/us/us\\_border-national-guard\\_1\\_national-guard-troops-border-patrol-security?\\_s=PM:US](http://articles.cnn.com/2011-12-20/us/us_border-national-guard_1_national-guard-troops-border-patrol-security?_s=PM:US) (accessed May 14, 2012).

<sup>109</sup>Heymann, 3.

<sup>110</sup>*Ibid.*

than 850 incidents involving terrorism, violent crimes, foreign counter-intelligence, and other investigations since its inception.<sup>111</sup> Mr. Heymann's findings further validated the point in referencing the Branch Davidian compound incident,

We cannot ask part-time special operations personnel to conduct such dangerous law enforcement operations. Just as we turn to our military for equipment that is uniquely able to provide, so should we be able to turn to the FBI to perform the tactical operations that it is uniquely situated to conduct.<sup>112</sup>

Mr. Heymann's recommendations to the Director of the FBI and the Attorney General to double the size of the FBI's HRT from 50 personnel to 100 personnel were adopted.<sup>113</sup> His recommendation to split the FBI HRT team into East coast and West coast teams was never acted on; FBI HRT remains based at Quantico, VA with total unit strength of fewer than 500 personnel as of 2010.<sup>114</sup> Civil law enforcement still lacks the capacity to conduct these large-scale domestic incidents without the assistance of the U.S. military.

### Recommendations

The creation of the Department of Homeland Security provides a national level option to address the persistent threat to U.S. ungoverned spaces. The funding for Homeland Defense by the Department of Defense already exists; passed into law by congress in 2004. Chapter 9 of Title 32 of the U.S. Code authorizes the Secretary of Defense to provide federal funding to a state under the authority of the Governor of that

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<sup>111</sup>Federal Bureau of Investigation.

<sup>112</sup>Heymann, 3-4.

<sup>113</sup>Ibid., 4.

<sup>114</sup>Cavallaro.

state to utilize their National Guard for “necessary and appropriate homeland defense activity.”<sup>115</sup> A recommended solution within the extension of Chapter 9, Title 32 in the form of a paramilitary organization circumvents Jurisdictional issues, and creates logical lines of effort, and unity of command throughout the incident.

1. The creation of a full time paramilitary police force trained, and maintained in sufficient size and strength to police our nations ungoverned spaces, established as a full time National Guard unit. Established under Title 32 control of the state’s governors, operational funds provided by Department of Homeland Security provides funds directly to the state. Because homeland security is a federal issue, or concerns a federal purpose, funding to support National Guard activities under Title 32 would receive federal pay and benefits, but remain under the control of the Governor. State control and deployment with funding through DHS would negate PCA restrictions while operating under Title 32 authority or under the state active duty status. Resources and manpower for events or incidents occurring within a state could be augmented if they exceed the capacity of that state as they are now through states’ Emergency Management Assistance Compacts (EMAC) during natural disasters and would come under the command of the supported state’s adjutant general. In 2004, the State of Arizona requested DoD federal funding for its National Guard under Chapter 9 for conducting homeland defense-border security activities.<sup>116</sup> The extension of a Chapter 9 paramilitary organization circumvents

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<sup>115</sup>Stephen R. Vina, *Border Security and Military Support: Legal Authorizations and Restrictions* (Washington, DC: Congressional Research Service, 2006), 1-6.

<sup>116</sup>*Ibid.*, 6.

Jurisdictional issues, and creates logical lines of effort, and unity of command throughout the incident.

2. The USNORTHCOM is a combatant command (COCOM) Headquartered at Peterson Air Force Base, CO responsible for the command and control of the Department of Defense's (DoD's) homeland defense efforts and to coordinate military support to civil authorities. USNORTHCOM is a geographic combatant command that has an area of responsibility for the continental U.S., Alaska, Canada, Mexico and the surrounding waters out to 500 nautical miles, which includes the Gulf of Mexico and the Straits of Florida. The Commander, USNORTHCOM is also dual-hatted to command the North American Aerospace Defense Command (NORAD). A paramilitary law enforcement organization under this command would bring the command and control, unity of effort and operational planning under one national roof so to speak. The United States government could bring its authority to bear in a coordinated and unified manner circumventing jurisdictional boundaries and geographic restrictions.

3. The structure of USNORTHCOM and its interagency relationships through the Joint Interagency Coordinating Group (JIACG) would promote coordination and direct lines of communication with more than 60 federal and non-federal agencies at Peterson Air Force Base, CO. These liaisons provide subject matter expertise and direct lines of communication with the parent organizations. The ability to coordinate this proposed National Guard law enforcement force's missions and create a unity of effort across other agencies would best be facilitated by its inclusion into USNORTHCOM.

The author has posed the research question of how can the U.S. project civil authority into America's uncontrolled spaces? He has demonstrated that thousands of

square miles of U.S. borders, National Parks, and Indian lands along with millions of acres of National Forests are uncontrolled spaces by Rabasa's definition. The author examined and discussed the organizational layers and jurisdictional restrictions that cause friction between federal law enforcement agencies creating gaps in civil authority in these uncontrolled spaces. The author further described the roles of the various federal agencies charged with the fulfillment of the President's 2010 National Security Strategy. To satisfy the author's recommendations on the use of the National Guard as a paramilitary police force, he examined the historical and current legal precedents the author believes allows the use of Title 32 National Guard troops to be legally deployed in this manner. Finally, the author analyzed the gaps in the ability of law enforcement to project civil authority into ungoverned spaces and the historical short falls of civil law enforcement in past events.

4. This full time unit would be a part of Joint Task Force North (JTF-N) under the direction of USNORTHCOM. JTF-N already has a homeland defense focus mission providing assistance to counter- drug operations along the southwest border integrating its military capabilities with state, local and federal law enforcement efforts. Placing this unit within USNORTHCOM gives the combatant commander USNORTHCOM the flexibility to augment homeland defense missions with the subordinate commands within USNORTHCOM as the size and scope of the mission dictates. This would support the unity of command and efforts during national incidents that have historically lacked in past law enforcement responses and leverage the experience of our military forces from over a decade of foreign stability operations.

### Recommendations for Further Research

The purpose of this thesis is to generate discussion and further research in securing the ungoverned spaces within the United States. The very nature of this nation's separation of power and balance of governance laid out by our founding fathers to protect the citizens of the United States has become fractured by time and a changing global footprint of state and non-state actors. The very mechanisms of democracy and the separation of power to protect this nation from government tyranny have also created a national vulnerability. It has created an aversion to a national police force or the use of the military as a paramilitary police force and has created multiple large governmental organizations competing for the same resources with little unity of effort. The author refrained from attempting to formulate a National Guard paramilitary police force structure, he believes that topic is beyond the scope of this thesis and is a future topic to be examined. The current thought and discussion in DoD Defense Support to Civil Authorities (DSCA) doctrine is that the military cannot be the lead agency in homeland security missions needs to be reexamined.

With the draw down of U.S. forces from the wars in the Iraq and Afghanistan, the military will need to find an increased role in homeland security missions to augment their Homeland Defense mission and maintain Congressional funding. With over ten years of experience in stability operations and the current legal exceptions to the PCA, the author does not see a reason the military could not function in a law enforcement capacity in joint operations with civil law enforcement authorities or as a lead federal agency with the appropriate training and oversight to project civil authority into the United States' ungoverned spaces. With the capacity and the resources of the U.S.



military deployed within the U.S., there is no reason U.S. citizens should be endangered by Drug Trafficking Organizations (DTOs), or criminals operating within the U.S. borders, National parks, forests or Indian lands. With the changing times and Globalization shrinking our world, the Author believes its time to engage the U.S. military as a law enforcement tool to project civil authority into the United States ungoverned spaces and protect our national security.

## GLOSSARY

The 10th Amendment to the United States Constitution. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. This is the amendment in the U.S. Constitution that reserves police powers to the states.”

Active Shooter. An incident where a subject or subjects enter an area or building and begin to “actively” shoot everyone they see. In some incidents the shooter takes hostages and barricades them selves. Most of the time the shooter is targeting specific people or groups they feel they need to take revenge on. In most cases the active shooter is mobile during the incident, this will create conflicting reports of how many shooters there are and where they are in the crime scene.

*Posse Comitatus Act.* As defined in Title 18 U.S.C. section 1385 “Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse Comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.”

Terrorism. The Federal Bureau of Investigation (FBI) defines terrorism as “the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof in furtherance of political or social objectives.” The FBI further classifies terrorism as either domestic or international, depending on the origin, base, and objectives of the terrorist organization.<sup>117</sup> The United States Code of Federal Regulations (28 C.F.R. Section 0.85) defines terrorism as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”

Terrorism as defined by Department of Defense. (joint) The Calculated use of unlawful violence or threat of unlawful violence to inculcate fear; [these acts are] intended to coerce or to intimidate governments or societies in the pursuit off goals that are generally political, religious, or ideological.<sup>118</sup> (JP 3-07.2)

Transnational organized crime. Refers to those self-perpetuating associations of individuals who operate transnationally for the purpose of obtaining power, influence, monetary and/or commercial gains, wholly or in part by illegal means, while protecting their activities through a pattern of corruption and/ or violence,

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<sup>117</sup>Federal Bureau of Investigation.

<sup>118</sup>Department of the Army, FM 3-0, *Operations* (Washington, DC: Government Printing Office, 2011).

or while protecting their illegal activities through a transnational organizational structure and the exploitation of transnational commerce or communication mechanisms. There is no single structure under which transnational organized criminals operate; they vary from hierarchies to clans, networks, and cells, and may evolve to other structures. The crimes they commit also vary. Transnational organized criminals act conspiratorially in their criminal activities and possess certain characteristics,<sup>119</sup> which may include, but are not limited to:

- In at least part of their activities they commit violence or other acts which are likely to intimidate, or make actual or implicit threats to do so;
- They exploit differences between countries to further their objectives, enriching their organization, expanding its power, and/or avoiding detection/apprehension;
- They attempt to gain influence in government, politics, and commerce through corrupt as well as legitimate means;
- They have economic gain as their primary goal, not only from patently illegal activities but also from investment in legitimate businesses; and
- They attempt to insulate both their leadership and membership from detection, sanction, and/ or prosecution through their organizational structure.<sup>120</sup>

Ungoverned Spaces. An area where the state is absent, unable, or unwilling to perform its functions. This does not imply the complete absence of power structures but can be characterized by the lack of penetration into the general society. Ungoverned spaces can be areas of the states where they poorly control their land, maritime borders or airspace. They may be otherwise viable states where the central government's authority does not extend. They are areas where "otherwise healthy states have lost control over some of its geographic or functional space within their territories."<sup>121</sup>

Wicked tactical problem. The author defines wicked tactical problems as complex, unstructured events requiring the dedication of a large amount of law enforcement resources, law enforcement officers over an extended period of time that requires the use of military resources, personnel and expertise to bring the event to a conclusion.

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<sup>119</sup>The White House, *Strategy to Combat Transnational Organized Crime* (Washington, DC: Government Printing Office, 2011).

<sup>120</sup>Ibid.

<sup>121</sup>Rabasa, et al.

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